United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7022

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P/S

JOHN H. MARCHESE,

Plaintiff-Appellant,

-against-

MOORE-McCORMACK LINES, INC.,

Defendant and Third-Party Plaintiff-Appellee,

-against-

COURT CARPENTRY AND MARINE CONTRACTORS CO., INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S REPLY BRIEF

IRVING B. BUSHLOW
Attorney for Plaintiff-Appellant
Office & P. O. Address
26 Court Street
Brooklyn, New York 11242
Telephone: (212) 522-7446

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

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-against-

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COURT CARPENTRY AND MARINE CONTRACTORS CO., INC.,

Third-Party Defendant Appellee.

PLAINTIFF-APPELLANT'S REPLY BRIEF

STATEMENT

This reply brief is being submitted because in their briefs appellees have elected to omit certain material evidence from their facts and have misrepresented the applicable law.

POINT I

THE CAUSE OF PLAINTIFF'S ACCIDENT WAS THE UNCHOKED PIPES

It is undisputed that the pipes were unchoked and the Court so found. It was also the undisputed testimony that the accepted, usual and safe way to carry this type of pipe was to chock it when it was loaded or build a crib for it to be loaded into (128-129a, 138a, 145a, 152a, 154a), and that these pipes would not have shifted after the lashings were removed if they had been properly braced or chocked (131a).

Considering the condition of the pipes, there was no way that they could be unlashed without them settling or spreading out, in both directions, which is exactly what happened. To credit appellees argument that plaintiff should have released the pipes slowly, by using the turnbuckles, and thus allow the pipes to settle slowly and presumably, crush plaintiff slowly, instead of quickly, would defy common sense or reason.

Obviously, if plaintiff had been

warned that the pipes were not chocked, in accordance with the shipowner's duty, he would have done his work differently or sought help. In retrospect, it is easy to argue what plaintiff should have done. Instead we are faced with what happened under the facts available to plaintiff at that time. Plaintiff did not know that the way he chose to do his work was not safe, since he did not know, and had no reason to believe, the pipes were not chocked. Consequently the cases cited on page 11 of appellee Court's brief to the effect that a shipowner cannot be charged with fault where a lasher chooses an unsafe instead of a safe way to so his work, are not applicable to this case. There is no proof that plaintiff knew that the pipes were unchocked.

Appellee Court also cites cases on page 11 of its brief regarding accidents caused 100% by plaintiff's fault. These cases also are not applicable since they involve fact patterns where the plaintiff actually created the dangerous condition and thus caused his own accident, where he disregarded orders resulting in his accident,

where he was in charge of work and knew of a dangerous condition and failed to have it corrected, or where he knowingly and voluntarily went into an unsafe area or did an unsafe act.

This Court recently had occasion to draw a distinction between an accident precipitated by an unknown or unexplained cause, and one caused solely by plaintiff's negligence, See *Sotell vs. Maritime Overseas Inc.*, 474 F2d 794, 796 (2nd Cir. 1973).

Surely the instant case does not fall into the latter category since the principal cause of plaintiff's accident was the unchocked pipes, not his negligence. The case is more nearly analogous to the former category of cases and is directly in point with *Crumady vs. The J.H. Fisser*, 358 U.S. 423 (1959) where a negligent act of a longshoreman brought an unseaworthy condition into play.

POINT II

PLAINTIFF DID NOT ASSUME THE RISK OF WORKING IN AN UNSAFE PLACE

Plaintiff has covered this point in his

brief at pages 19-23. Appellees completely disregard the law as to contributory negligence when a longshoreman is ordered to work in a dangerous area and the law as to assumption of risk because there is no way they could rationalize the Court's findings and conclusions of law with the evidence and the cases cited in plaintiff's brief. Instead they attempt to build a fiction that plaintiff deliberately went into an unsafe place and chose to do his work in an unsafe manner. The law is clear that plaintiff did not have a duty to inspect and check an area where he was ordered to work in order to determine whether it was safe. The opposite proposition is true. Plaintiff could assume that his work area was safe unless the danger was open and obvious, which was not the case herein.

POINT III

THE PIPES WERE STOWED ONLY IN A CONDITIONALLY PROPER MANNER

Appellees argue that the pipes arrived in a secure manner. In a similar situation this Court referred to stowed cargo as "conditionally proper" only if the cargo was discharged by

fullfillment of the condition, otherwise the vessel could not escape liability. See *Amador v. A.I.S.J. Ludwig Mowinckels Rederi*, 224 F.2d 437, 440 (2nd Cir. 1955), cert. den 350 U.S. 901 (1955).

The pipe cargo in this case might also be referred to as stowed in a "conditionally proper" manner, as long as the pipes were chocked before discharging or before they were unlashed. The chocking would fullfill the condition and make the stowage proper. Herein, no effort was made to chock the pipes in New York so the stowed pipes became improperly stowed, and thus unseaworthy, when plaintiff was allowed to unlash the pipes without them being chocked.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND THIS CASE REWARDED FOR PROPER FINDINGS AND CONCLUSIONS OF LAW.

Respectfully submitted

IRVING B. BUSHLOW
Attorney for Plaintiff-
Appellant

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Reply Brief

IS HEREBY ADMITTED.

DATED: 4/4/75

Naughton, Ryan, Delaney, Belgum & Duffy
Not in the Office

Attorney for

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Reply Brief

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DATED:

Attorney for